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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 369.

THE SUSQUEHANNA POWER COMPANY, Appellant,

v.

STATE TAX COMMISSION OF MARYLAND.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND.

APPELLANT'S REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

STEVENSON A. WILLIAMS,
WM. CLARKE MASON,
FREDERICK R. WILLIAMS,
A. ALLEN WOODRUFF,
123 SOUTH BROAD STREET,
PHILADELPHIA, PA.
Counsel for Appellant.

MORGAN, LEWIS & BOCKIUS,
Of Counsel.

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The Appellant heretofore filed its "Statement As To Jurisdiction On Appeal," and in due course this Court noted probable jurisdiction and postponed further consideration to the hearings on the merits. The Appellant filed its Brief on the merits of the appeal and thereafter a Motion to Dismiss or Affirm and a Brief in support thereof was filed by the Appellee, although no such brief was filed pursuant to Rule 12 of this Court in reply to the "Statement As To Jurisdiction On Appeal."

The Appellant refers this Court to its memorandum in support of the Statement as to Jurisdiction on Appeal and to the Brief on the merits of this cause in support of the

right of the Appellant to be in this Court on appeal from the judgment of the Court of Appeals of the State of Maryland pursuant to the provisions of Title 28 U. S. C. Section 344 (a).

The Appellant asserts its claim with confidence under that section, but suggests to this Court that if, for reasons that seem to it sufficient, the proper writ would be that of *certiorari* under Section 344 (b), that the Record in this case clearly justifies this Court in taking jurisdiction, by considering the papers on appeal as in the nature of a petition for writ of *certiorari* and maintaining its jurisdiction pursuant to the mandate of Section 344 (c).

The Brief for the Appellee makes certain admissions to which the particular attention of the Court is directed, and also makes certain assertions which appear to the Appellant to be without sufficient foundation in fact or in law, and, as to these, a brief statement will be made.

There are three questions raised for the consideration of this Court by the Motion to Dismiss, and for the purpose of this reply they will be considered in the order presented in the Brief of the Appellee (p. 5):—

> (1) "The contention that the 'minimum provision' imposes an invalid tax upon the shareholder is wholly unsubstantial."

The provisions of the statute (Section 163 of Article 81 of the Maryland Code) containing this minimum provision will be found in the Appellant's Brief on the merits (pp. 35-37). As to this the Appellee says (Brief, p. 8):—

> "In other words, the Court of Appeals found that the Commission had properly ascertained the value of the shares to be $28,726,132 even after making allowance for the company's outstanding indebtedness, and this conclusion of fact upon which the decision of the Court of Appeals rested finds support in the record. For it there appears that the company has a fixed investment of $45,677,316.60 (r. 11) upon which, by the

terms of the lease from the company to the Philadelphia Electric Company it is guaranteed a net return of 7% plus taxes, expenses and depreciation (r. 34-35).

"It follows that the decision of the Court of Appeals in so far as it relates to the minimum provision, rests upon an adequate non-federal ground, and furnishes no basis for the jurisdiction of this court under 28 U. S. C. 344 (a)."

In this statement the Appellee is in error because the facts do not show a net return of 7% upon $45,677,316.60. An abstract of the "Lease of Maryland Properties" upon which the gross return to Appellant is based is set forth on pp. 272-275 of the Record in Case No. 368 which shows the rental to be 7% of "the actual legitimate investment" of Appellant in the project. The provisions of this lease showing payment of additional items as rent are set forth in full as Article *Sixth* on p. 263 of the Record in Case No. 368. (There was no change of this Article *Sixth* in the final modifications of this Lease which are shown on pp. 235-238 of the Record in Case No. 368.) An examination of said Article *Sixth* shows clearly that the Lessor (this Appellant, described as Corporation "A" in the Lease), does not receive as additional rental any *interest* on bonds or other indebtedness. This fact was called to the attention of the State Tax Commission by counsel for the Appellant on p. 50 of Record in Case No. 369 when he said:—

"There is no question but that bond interest is paid out of the rent."

It follows from the conceded facts that the income of the Appellant cannot exceed 7% upon its actual investment, which investment, for the purposes of this case, may be taken at the figure shown in the Record of this case (p. 11), *i. e.*, $45,677,316.60. The deductions from rental appear (R. 8) as "Expenditures and Charges" and show, as stated in the Return of the Appellant to the State Tax Commission, no net revenue for the year ending December 31, 1928,

as of which date the Return in question was made. This probably was due to the fact that the year in question included the period of final construction when neither the indebtedness nor the investment were fixed sums throughout the whole year, but increased disproportionately. The Appellant will ignore, for the purpose of the argument herein made, the fact that the Record actually shows no earnings available for dividends on the stock of this Company as of December 31, 1928, and approaches the consideration of net earnings available for dividends on the assumption that the project having been completed prior to January 1, 1929, earnings and interest charges would be for consideration during 1929 on the basis of the total investment and the total indebtedness throughout the whole of that year shown as of January 1, 1929, and that even upon such a consideration the assessed valuation of $28,726,132 (Rec. p. 13) of the stock of this Company based on net earnings, as contended in the Brief of the Appellee (p. 8), cannot be sustained. The following computation shows the maximum valuation that can be arrived at, based upon a capitalization of net earnings available for dividends:—

Total investment in Project in Maryland (R. pp. 11, 28)	$45,797,111.42
Rental at 7% of above (R. p. 35)	$3,205,797.80
Less 5½% interest on Indebtedness of $41,954,998.92 (R. 9, 10)	2,307,524.94
Available for Dividends not in excess of	$898,272.86
$898,272.86 capitalized at 7% shows a value for total capital stock to be not in excess of	$12,832,469.43

When this last figure is used and the assessed value of real property $22,726,132 (R. p. 13) is deducted no taxable value can be shown for the shares of stock.

The Record shows that there were no sales of the stock of the Appellant during 1928 and therefore no market-value could be taken into consideration in arriving at the assessed value (Rec. p. 8, Par. 14).

The Record further shows that the net assets or net worth of the Company, taking into consideration its conceded indebtedness, was not in excess of the sum of $4,866,-886.36 (Rec. p. 10).

It follows from the foregoing undisputed facts that the valuation fixed by the State Tax Commission could not have been based upon market value, net earnings or net assets. The statement of the learned Court of Appeals, therefore (Rec. p. 69) that:—

> "nor does it appear that the assessment was in fact higher than the fair value of the stock assessed,"

is without foundation in fact, ignores the "actualities" and can only be sustained by assuming that the State Tax Commission was justified in complying with the mandate of the minimum provision of the taxing statute herein assailed in fixing the aggregate assessed value of the shares at the sum of $28,726,132 (R. p. 13). The Appellee appears to concede that there is no foundation *in fact* for the assessment made, but justifies the minimum provision of Section 163, of Article 81 of the Maryland Code, by the argument in the Brief of Appellee (pp. 9-15, inclusive) in which, *inter alia*, it is said:—

> "The tax on the shares, in so far as the minimum provision is invoked, is a direct tax on the shareholders as owners without regard to the corporate entity, based not on the value of their shares but on the value of the corporation's tangible personalty located in the State, which would otherwise be exempt from taxation." (Appellee's Brief, p. 11.)
>
> "In other words, as construed by the Court of Appeals, the minimum provision undertakes to disregard the corporate entity and to assess to each share-

holder a proportionate part of the full value of all tangible personal property belonging to the corporation and having a situs for taxation in the State of Maryland, without regard to any indebtedness. Manifestly the State might have assessed this tangible personalty direct to the corporation. The State, however, elected to exempt the corporation as such from taxation on this property, and to impose the burden on the shareholders." (Appellee's Brief, p. 14.)

The Appellant refers this Court to the argument made in its briefs heretofore filed, and to the decisions of this Court with which it is so familiar, as a complete answer to this attempted support of the condemned statute.

The next reason presented why this Court has no jurisdiction (Appellee's Brief, p. 5) is:—

(2) "The contention that a State may not tax the shares of capital stock of a domestic corporation, where the shares are owned by non-residents is foreclosed by prior decisions of this court."

This question is disposed of by the Appellee by the statement that it has been decided contrary to the contention of the Appellant by this Court in *Beidler* v. *South Carolina*, 72 Law Ed. 69 (Brief of Appellee, p. 16). Counsel for the Appellant have been unable to find in the opinion of Mr. Chief Justice Hughes in the last cited case, support for this assertion and therefore refer the Court to the authorities heretofore cited in the brief for the Appellant on the merits (pp. 11-20 inclusive).

Appellee finally asserts (Appellee's Brief, p. 5):—

(3) "The contention that the State, in assessing shares of capital stock for purposes of taxation, may not include value attributable to a federal license, is foreclosed by prior decisions of this court."

In answer to this assertion of Appellee the Appellant relies upon the argument and authorities in the Brief for Appellant

on the merits (pp. 20-27 inclusive). It appears to be conceded by the Appellee that a value was given to the shares of stock of the Appellant attributable to the Federal License. The right of the State Tax Commission to include such a value is sustained by the learned Court below in its opinion (Rec. p. 70; Appellant's Brief on merits, p. 21). The issue seems to be clearly raised between the Court of Appeals of Maryland and counsel for the Appellee on the one hand and the decisions of this Court cited in Appellant's Brief on the other.

Whether or not, if this were the sole question before this Court, it could be properly brought within its jurisdiction by appeal from the State Court, would seem to be a moot question in this case, because it would appear that, for other reasons, the case is properly here on appeal, and therefore as this question was raised before, and decided by, the State Court, adversely to the contention of the Appellant, it will be considered by this Court together with the other questions within its jurisdiction under Section 344 (a). If not thus within the jurisdiction of this Court, this question would appear to have been properly raised, and may be for consideration by treating the papers on appeal, as to this question, as though a petition for writ of *certiorari* to the learned Court below on the ground of the denial of the immunity claimed by reason of the Federal franchise.

CONCLUSION.

It is respectfully submitted that the above entitled cause is within the jurisdiction of this Court for the reasons given, and that the questions raised upon the merits of the cause may all be fully considered and disposed of.

Respectfully submitted,

STEVENSON A. WILLIAMS,
WM. CLARKE MASON,
FREDERICK R. WILLIAMS,
A. ALLEN WOODRUFF,
Counsel for Appellant.